IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 6, 2006 Session

JANN B. BROYLES v. THOMAS STANDIFER, ET AL.

Appeal from the Chancery Court for Hamilton County
No. 04-0877 W. Frank Brown, III, Chancellor

No. E2005-02791-COA-R3-CV - FILED DECEMBER 4, 2006

Jann Broyles ("Plaintiff") owns land adjacent to land owned by Thomas and Anneliese Standifer ("Defendants"). This dispute involves a pond located primarily on Plaintiff's property but also partially on Defendants' property and two other ponds entirely on Defendants' property. After Defendants erected a dam which diverted the water that had flowed into Plaintiff's pond, Plaintiff filed suit. Thereafter, Plaintiff cleared a majority of the natural vegetation that was on her land. Several days later there was a very heavy rainfall. The removal of this vegetation resulted in damage to the two ponds on Defendants' property. Both parties claimed the other had created a nuisance. The Trial Court agreed and determined that both parties had created temporary nuisances. After offsetting Plaintiff's judgment by the judgment awarded to Defendants, Plaintiff received a net judgment of $785. Plaintiff appeals. We modify the judgment to Plaintiff by increasing it to $4,990, and as so modified, the judgment of the Trial Court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

John R. Anderson and Robert S. Grot, Chattanooga, Tennessee, for the Appellant Jann B. Broyles.

Timothy M. Gibbons and Daryl J. Brand, Chattanooga, Tennessee, for the Appellees Thomas Standifer and Anneliese Standifer.

OPINION

Background

Plaintiff owns land directly adjacent to land owned by Defendants. In August of 2004, Plaintiff filed a Verified Complaint for Abatement of a Nuisance and Request for Injunctive Relief. According to Plaintiff, there is a natural spring located on Defendants' property which fed into a pond located predominantly on Plaintiff's property. Plaintiff claims that Defendants illegally erected an "earthen dam" approximately 600 feet long on their property which wrongfully interfered with the natural drainage of surface water by blocking the flow of that water. According to Plaintiff:

> [Plaintiff] has no adequate remedy at law for the harm and damage caused by the presence of the newly erected dam, because it is believed that the design and the placement of the recently erected dam will cause the dam or parts of the dam to run off or collapse into the pond and/or it will divert the natural drainage of the surface water so that it will pour in a concentrated manner on to other parts of [Plaintiff's] property thereby causing excessive erosion and other damage to her property.…
>
> Plaintiff is suffering and will continue to suffer irreparable harm, damage, and injury to the free use of her property while the dam located on Defendants' property remains in place and continues to block the primary source of water to the pond and causes large amounts of soil and debris to spill into the pond and causes surface waters to pour in a concentrated manner on to other areas of her property causing damage thereto.…
>
> In order to maintain the water level in the pond and to protect the wildlife that relies on the pond, [Plaintiff] was compelled to have a well and a pump installed on an expedited basis to supply water to the pond at a cost in excess of $5,000.00.

Defendants responded to the complaint by filing an answer and counterclaim. Defendants denied the pertinent allegations in the complaint. Defendants also claimed that Plaintiff had removed a substantial amount of natural vegetation from her land which caused silt-laden runoff to spill onto Defendants' property and into two ponds located on their property. Defendants denied any liability to Plaintiff and sought compensation for the damage to their land and two ponds allegedly caused by Plaintiff's removing the vegetation from her land.

The Trial Court entered an order in October of 2004 which provided that while it appeared likely that Plaintiff would prevail on the merits of her claim, she had failed to show a threat of immediate harm. Nevertheless, the Trial Court ordered Defendants to:

> [D]etermine if it is in all the parties' best interests to remove the dam, or if other measures can be taken to avoid irreparable harm to the Plaintiff's property[;… to] consult their attorneys, their engineer, and the Tennessee Department of Environment and Conservation to determine the best way to restore the flow of water to the Plaintiff's property and into the Plaintiff's pond as [it] existed before the Defendants caused the dam to be erected [; …and to] submit a plan to the Court and to the Plaintiff's counsel … that implements a short-term solution to re-establish the flow of water to the Plaintiff's property and pond or, in the alternative, that proposes a long-term solution to re-establish the natural flow of water from the Defendants' property to the Plaintiff's property and pond that existed prior to the Defendants' unpermitted erection of the embankment and emergency spillway.…

Thereafter, an agreed order was entered in February of 2005 which, among other things, required Defendants to file a proposed plan "to deal with the dam's structural stability issues, but only in the event the analysis of the core samples raise material issues as to the dam's stability…."

A hearing was conducted in March of 2005, at which time expert engineering proof was provided to the Trial Court. Following the hearing, the Trial Court entered an order which stated:

> At the conclusion of expert proof in this action, the Court determined that the earthen dam at issue in this action should remain in place …. Defendants shall complete the work to improve the earthen dam, and to restore the water flow from their property onto the Plaintiff's property by July 23, 2005 **(unless delayed by the Tennessee Department of Environment and Conservation approval process)** as proposed and recommended by their engineers, and shall further secure all necessary approvals from TDEC for such additional work on the earthen dam.… Defendants shall advise the Plaintiff, by and through her attorneys, of the Defendants' remediation plan, and, until the remediation plan is approved and completed, Plaintiff's engineer shall have the right to enter the Defendants' property to inspect the dam and the other components to the Defendants' remediation plan with reasonable notice to Defendants' attorneys.… (emphasis in original)

The Trial Court then set the remaining issues for a trial in August of 2005.

The trial took place as scheduled, with the first witness being Richard Urban ("Urban"), an environmental field office manager with the Tennessee Department of Environment and Conservation ("TDEC"). According to Urban, he received a telephone call from Plaintiff concerning the activities on Defendants' property. The TDEC conducted an investigation and determined that Defendants had violated state law in the building of their dam. Defendants were issued a notice of citation. Urban testified that he discussed various options with Plaintiff. One of the options was for Plaintiff to install a well to augment the water flow so that the pond would not dry up. Another option was for Plaintiff to bring an administrative action before the water pollution control board. Urban also informed Plaintiff that she would need to hire an attorney, if she wanted something done immediately, because the administrative process was very slow. Urban added that with the remedial actions taken by Defendants by the time of trial, they are now in compliance with TDEC requirements.

The next witness was Derek Hodnett ("Hodnett"), an engineer employed by Aquaterra Engineering. Hodnett was hired by Plaintiff to provide technical advice and prepare reports relative to the construction of the dam immediately adjacent to Plaintiff's property. Hodnett determined that the hydrology of the pond would be affected by the dam built by Defendants.[1] Hodnett prepared several reports and visited Plaintiff's property in order to make the reports. Hodnett stated that the time he spent on Plaintiff's case was reasonable. Hodnett added that the total engineering fees were consistent with those charged by engineering firms in the area and were customary for the type of work that was performed on this case. The total fees were $6,041.20. Hodnett testified that it was reasonable for Plaintiff to have a well installed to alleviate the lack of water, noting that "[w]ells can produce enough water to make up any deficit for surface water runoff."

The third witness was Plaintiff, who testified that she no longer is concerned about the structural integrity of the dam. The court previously had required Defendants to put in a buttress at the foot of the dam, which they did, and Plaintiff was "very impressed" with what Defendants did to comply with the court's order. Plaintiff added that the stormwater overflow spillway has been redirected to her pond. When asked why she had a well installed on her property, Plaintiff stated:

> I was very, very surprised [about Defendants] stopping the spring and I was very, very concerned about my pond. I contacted what I thought were the appropriate people, and that was their recommendation to me, that – I mean, he stated it was one option, … but he also stated to me that this could take three years for the process through TDEC, and that, in my mind three years, that there won't be a pond left to worry about.… [I was] concerned about the integrity of my pond.

[1] At this point in the proceedings, it essentially was agreed that the dam affected the hydrology of Plaintiff's pond and that Defendants had remedied the problem. Hodnett's conclusion in this regard was no longer directly at issue. Hodnett was called as a witness primarily because Plaintiff was seeking compensation for the costs incurred in hiring Hodnett as an engineering expert during the litigation and for his testimony concerning the reasonableness of Plaintiff's having installed the well.

> The only other option was to hire an attorney to get it done quicker and to get some water going to my pond. I did both. That was my option. It was, you know, drag this thing out and let my pond go away or do what I could to save it, and that is what I did.

Plaintiff had the well installed by David Mills Well Drilling for a total cost of $6,205.00. Plaintiff testified she has used the well to fill the pond several times. Plaintiff also testified that she has incurred $965 in court reporter fees plus $20,362 in attorney fees. Plaintiff stated that she was familiar with rental values in the general region, and the fair rental value of her house located next to the pond was $650 per month. Plaintiff added that she could not have rented the house because of the potential liability from the dam, as originally constructed by Defendants, breaking and flooding Plaintiff's property. Plaintiff was seeking lost rental value from the time Defendants originally constructed the dam up until the time the repair and upgrades were completed one month before trial. Plaintiff owns four rental houses and has "dealt with rental property all my life."

Plaintiff admitted that she cleared the vegetation from a substantial area of her land that was located adjacent to Defendants' property. Plaintiff had the fields "completely turned, leveled out, and reseeded." According to Plaintiff, the Tennessee Department of Agriculture provided funds for Plaintiff to reestablish the pasture. Plaintiff stated:

> [The Department of Agriculture] provided funds for us to do that, to reestablish the pasture, and directions as to the time limits to do it and the way to seed it and pretty much every step of the way to get the pasture to their specifications so they would fund the project.

Soon after Plaintiff cleared the land, Hurricane Ivan caused a substantial amount of rain in the area.

The next witness was David Mills ("Mills"), who installed the well on Plaintiff's property. Mills testified that the cost of the well was $6,205, and that amount was reasonable and consistent with rates charged for similar services in the area.

Defendant Thomas Standifer ("Standifer") testified that the work needed to buttress the dam has been completed. Standifer testified that his property was damaged by silt when Plaintiff "plow[ed] up the whole place." Standifer claimed that one of his ponds was almost full of silt, and another pond was one-third full of silt. Standifer testified to the amount it would cost to refurbish the two ponds and rid them of the silt which was deposited there in the runoff from Plaintiff's property after Plaintiff removed the vegetation from her property. Standifer's total estimate for refurbishing the two ponds was $8,420.00. Standifer stated that he has paid $12,532.70 for engineering fees since this litigation began.

Following the trial, the Trial Court entered a very thorough and well reasoned memorandum opinion setting forth its various factual findings and conclusions of law. As relevant to the issues on appeal, the Trial Court stated:

> This is a dam case which shows the results of lack of communication between neighbors. The case also exemplifies the high cost of litigation in today's society.…
>
> Ms. Broyles sued the Standifers for building a dam on their adjacent property, in such a way that would prevent the natural flow of water into a pond on land belonging to (primarily) Ms. Broyles and the Standifers. Ms. Broyles, in addition to seeking judicial assistance, also asked the Tennessee Department of Conservation ("TDEC") for help.…
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> [T]he Standifers filed their Answer and Counterclaim. A number of legal defenses were raised by the Standifers. In addition the Standifers sued Ms. Broyles for a nuisance. They alleged she had disturbed her land in such a way that the rains produced by Hurricane/Tropical Depression Ivan ("Ivan") caused silt, debris and seed/vegetation to go into two ponds owned by the Standifers.…
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> Both parties have sued each other under the law of nuisance. Ms. Broyles sued for the decreased value in the rental value of her land, the costs for digging a water well on her property, reimbursement of her expert witness fees, attorney fees, court reporter expense[s], and inconvenience and personal distress.
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> Trial Exhibit 1 is a collective exhibit of five (5) statements from Aquaterra Engineering, LLC, which provided geotechnical and surface water advice … to Ms. Broyles in this case. These five (5) statements total $6,041.20 for services from the beginning of the issue through March 27, 2005.… Trial Exhibit 2 is the statement of David Mills Well Drilling. Mr. Mills charged $6,205.00 for drilling a 400-foot well.… In addition to these documented expenses, Ms. Broyles testified that the rental value of her property decreased as a result of the Standifers' constructing their dam. Ms. Broyles estimated the fair market rental loss to range from $7,200.00 to $7,500.00.
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> The Standifers sued Ms. Broyles for the cost of cleaning and restoring their two ponds. Mr. Standifer estimated the costs of cleaning the two polluted ponds at $8,420.00. He based this estimate

on equipment charges he had paid on other projects, such as the dam construction, and costs for similar pond work. … Trial Exhibit 9 is a collective exhibit of statements from [the Standifers'] engineering experts…. These statements total $10,830.59….

After reviewing the applicable law, the Trial Court determined that both Plaintiff and Defendants had created nuisances and that the nuisances were temporary, as opposed to permanent. According to the Trial Court:

> Here, we have a temporary nuisance created by the Standifers because the nuisance has been remedied by the expenditure of money and labor. The nuisance allegedly created by Ms. Broyles is also a temporary nuisance because the two ponds can be cleaned and restored by the expenditure of labor and money.…
>
> [The Court in *Pryor v. Willoughby*, 36 S.W.3d 829 (Tenn. Ct. App. 2000) discussed] a temporary nuisance and the measure of damages in such cases. The Court stated:
>
> > A temporary nuisance is one that can be corrected by the expenditure of labor and money. *Caldwell v. Knox Concrete Products, Inc.*, 54 Tenn. App. 393, 391 S.W.2d 5, 11 (Tenn. Ct. App. 1964). In cases of temporary nuisance, the normal way to measure injury to the use and enjoyment of property is the decrease in rental value of the property while the nuisance exists. *See Pate v. City of Martin*, 614 S.W.2d 46, 48 (Tenn. 1981); *Citizens Real Estate v. Mountain States Development Corporation*, 633 S.W.2d, 763, 767 (Tenn. Ct. App. 1981). [Footnote omitted.]
> >
> > In such a situation, a plaintiff is not being compensated for not receiving rents that she would otherwise have been able to collect, but because she was unable to use or enjoy her property in a manner commensurate with its pre-nuisance value. It therefore follows that property owners cannot be disqualified from an award of damages measured by the decrease in the rental value of their property, simply because they continue to live on it despite the nuisance.
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> *Id.* at 831-32.…
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> Mrs. Broyles testified further that she would not have rented the house to third parties for fear that the Standifers' newly

> constructed dam would break and the house flood. She estimated the length of time, from the first construction until she felt the dam was secure and no longer a threat, to be twelve months. Thus, the damage to the real estate would range between $7,200.00 (12 x $600.00/month) and $7,500.00 (12 x $650/month) based upon Ms. Broyles' testimony.…
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> Ms. Broyles now has a new, good well. The well was considered as "insurance" to make certain there was water in the pond. At trial she testified she had run the well 24 times, more or less. She turns on the well and lets it run for a day or 2 when the water level drops in the pond. However, on cross-examination, she admitted that during her deposition (in March of 2005) she testified she had run the well only once. The other times must have been after March of 2005.…
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> Ms. Broyles wanted to use at least part of her property, consisting of some acres, for horses. After contacting the Department of Agriculture, she cleared a substantial portion of the land about two weeks before Ivan went through this area.… The fields were plowed, turned, leveled out and then re-seeded. Ms. Broyles received government money for such.
>
> However, as a result of such work, there was little or no vegetation to hold the soil when the very heavy rains from Ivan came to the Tennessee Valley. The water caused silt, soil, seed and debris to flow downward to two ponds located on the Standifers' property. Ms. Broyles did not take any advanced precautions to keep her soil, etc. from going onto the Standifers' property.

The Trial Court then awarded Ms. Broyles $4,000 in damages for the decrease in rental value of her property. The Trial Court arrived at this figure by determining Ms. Broyles was entitled to damages for eight months at a decreased rental value of $500 per month. The Trial Court then awarded Ms. Broyles $2,000 toward the cost of the well. The Trial Court did not award the full cost the well because Ms. Broyles was "better off now than she was before the lawsuit began with regard to the water issue.… Ms. Broyles now has a source of water (the new well) available to her to do something (maintain a high water level in her pond if she so chooses) that was not previously available to her through mother nature." Finally, the Court awarded Ms. Broyles $2,400 for her "discomfort, inconvenience, embarrassment, emotional distress and worry."

The total awarded to Ms. Broyles was $8,400. The Trial Court then awarded the Standifers a judgment in the amount of $7,615 for the cost of restoring the two ponds on Defendants'

property which were damaged when Plaintiff removed the vegetation. After off-setting the awards, the Trial Court entered a total judgment for Plaintiff in the amount of $785.00.

Plaintiff appeals raising three issues. First, Plaintiff claims the Trial Court erred in not awarding the full amount of $6,205 which she incurred to have the well installed. Second, Plaintiff claims the Trial Court erred in not awarding the full $7,800 sought by Plaintiff for lost rental value. Plaintiff's final issue is her claim that the Trial Court erred when it awarded Defendants $7,615 in damages in order for Defendants to remove the silt in their two ponds.[2]

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

The first issue is whether the Trial Court erred when it failed to award Plaintiff the entire cost of having the well installed. Defendants argue that the purpose of awarding damages in a nuisance case is to restore a plaintiff's property to the condition that existed prior to the creation of the nuisance. Because Plaintiff was placed in a better position with the installation of the well, Defendants argue the Trial Court correctly reduced the amount awarded to Plaintiff.

The Trial Court obviously found it was reasonable for Plaintiff to have the well installed as otherwise the Trial Court would not have awarded any damages related to the cost of the well. The proof offered at trial certainly preponderates in favor of this conclusion. There is no doubt that the dam built by Defendants diverted the natural existing water flow to Plaintiff's property. While Defendants later took steps to remedy the problem they created, this does not mean that Plaintiff did not act reasonably in having the well installed when she did. There was nothing offered at trial to indicate that the cost incurred by Plaintiff in having the well installed was in any way unreasonable or that she could have had a less expensive well installed in its stead. In short, the proof shows, as found by the Trial Court, that Plaintiff acted reasonably in having the well installed when she did, and that the well was installed for a reasonable amount. Plaintiff, therefore, should have been awarded the full cost of the well even though she also ultimately received an additional incidental benefit from the installation of that well. We modify the Trial Court's judgment to increase the amount awarded to Plaintiff for having the well installed from $2,000 to $6,205.

[2] Neither Plaintiff nor Defendants were awarded their expert engineering fees or attorney fees, and these rulings by the Trial Court are not challenged on appeal.

The next issue is whether the Trial Court erred when it awarded Plaintiff only $4,000 for the lost rental value of her property. Plaintiff sought $650 per month for a twelve month period. The Trial Court awarded $500 per month for eight months.

As stated in *Pryor v. Willoughby*, 36 S.W.3d 829 (Tenn. Ct. App. 2000), "[i]n cases of temporary nuisance, the normal way to measure injury to the use and enjoyment of property is the decrease in rental value of the property while the nuisance exists." *Id.* at 831. While each side denies having created a nuisance, neither Plaintiff nor Defendants take issue with the Trial Court's determination that if they did create a nuisance, it was a temporary nuisance. In *Pryor*, the defendants' construction activities cause water to pool in front of the plaintiffs' house. The *Pryor* Court then discussed the following events:

> This pooling of water was directly above the Pryors' septic tank. On April 29, 1996, Mrs. Pryor was doing laundry when she heard water gurgling in a sink. She went into the master bathroom, where she saw that sewage water was pouring out of the drains in the shower stall and bathtub, and out of the toilets. To prevent a recurrence of such an event, the Pryors had to have their septic tank and field lines uncovered, and the septic tank pumped. Thereafter, they had to leave the lid of the septic tank off.…
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> Sharon Pryor testified as to the odors coming from the open septic tank, the alteration of her normal habits of water usage for fear of worsening the problem, and the impossibility of entertaining friends in the Pryor home.…

Id. at 830.

The trial court in *Pryor* refused to award any damages for loss of rental value because the plaintiffs continued to reside in their home. This Court reversed, stating:

> [A] plaintiff is not being compensated for not receiving rents that she would otherwise have been able to collect, but because she was unable to use or enjoy her property in a manner commensurate with its pre-nuisance value. It therefore follows that property owners cannot be disqualified from an award of damages measured by the decrease in the rental value of their property, simply because they continue to live on it despite the nuisance.…
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> Sharon Pryor worked as a realtor. At trial she was asked what a home like hers would normally rent for if the septic system were working normally. Ms. Pryor noted that the house had over 3500 square feet and a full basement, and stated that in that neighborhood,

> it would bring anywhere from $2,000 to $2,200 per month in rent. She was then asked, "[a]s a realtor, do you think there was any way you could have rented that house with the septic tank not working and the sewage going in the front yard?" She answered "No."
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> While Mrs. Pryor's response could support a conclusion that the rental value of the property was reduced to zero, we believe the better interpretation to be that the septic problems had reduced its value to a de minimis level. In reversing the trial court, we therefore grant the appellants a judgment of $20,000 for the loss of rental value of their property during the period of the nuisance.

Pryor, 36 S.W.3d at 832.

Thus, a plaintiff is not necessarily entitled to the full amount of the rental value, but rather is entitled to the amount of the decrease in rental value. Returning to the present case, Plaintiff testified that she would not have been able to rent the house because of her fear that the dam would break and flood the property. Plaintiff also testified that the rental value of the property was $650 per month. The Trial Court made the following findings when awarding Plaintiff a decrease in rental value of $500 per month for eight months:

> The court awards Ms. Broyles $4,000.00 for the diminishment of the rental value of her property. The amount allowed is less than the amount claimed by Ms. Broyles. However, the court notes that Ms. Broyles used the property. She lived in it. Her fear of a flood, while perhaps a worry to her, never happened and the experts did not think the dam was liable to fail and flood her property. More important, the fear of the flood did not occur until mid-December of 2004 and the dam was completed by mid-August of 2005. The court awards $500.00 per month diminished rental value for eight months or $4,000.00 for this element of damages.

Pryor makes clear that a plaintiff's continued use and enjoyment of the property does not bar a recovery. However, this does not mean continued use and enjoyment of the property cannot be taken into account when ascertaining the injury to the use and enjoyment of that property. In other words, a plaintiff who continues to reside in the residence may be found to still have had some legitimate use and enjoyment of the property, even if that continued residency does not serve as a complete bar to recovery. Moreover, as was the case in *Pryor*, we believe that a plaintiff's continued occupation of the residence is evidence that there continues to be, at least, a de minimus rental value to the property.

We conclude that the evidence does not preponderate against the Trial Court's findings and resulting conclusion that Plaintiff suffered an injury to the use and enjoyment of her

property with that injury being a $500 loss in rental value for a period of eight months. The Trial Court's judgment on this issue is affirmed.

The final issue is Plaintiff's claim that the Trial Court erred when it awarded Defendants $7,615 in damages to compensate them for the cost to remediate their ponds. Plaintiff claims the significant amount of rain caused by Hurricane Ivan was an "Act of God" and she, therefore, cannot be held liable for any damage to Defendants' property caused by this rain. We rejected a similar claim in *Zollinger v. Carter*, 837 S.W.2d 613 (Tenn. Ct. App. 1992). *Zollinger* involved a claim by the plaintiffs that their property was flooded because of a change in surface water drainage caused by the development of adjoining properties by the defendants. In affirming the trial court's rejection of the "Act of God" defense, we stated:

> The law regarding a change in natural drainage is well-settled in this jurisdiction. If the owner of higher lands alters the natural condition of his property so that surface waters collect and pour in concentrated form or in unnatural quantities upon lower lands, he will be responsible for all damages caused thereby to the possessor of the lower lands. *See Tyrus v. Kan. City, Ft. S. & M.R. Co.*, 86 S.W. 1074, 114 Tenn. 579 (1905); *Gregory v. Jenkins*, 665 S.W.2d 397 (Tenn. App. 1983); *Slatten v. Mitchell*, 124 S.W.2d 310 (Tenn. App. 1938) and *Woodlawn Memorial Park of Nashville, Inc. v. L & N Railroad Co.*, Inc., 377 F. Supp. 932 (D.C. Tenn.1972).
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> It is equally well-settled that "a wrongful interference with the natural drainage of surface water causing injury to an adjoining landowner constitutes an actionable nuisance." *Butts v. City of South Fulton*, 565 S.W.2d 879 (Tenn. App. 1977).…
>
> With regard to the "Act of God" defense, we are of the opinion that it is inapplicable to the case at hand. An "Act of God" is clearly defined in *Butts, supra*. In *Butts* it is said:
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> > Any misadventure or casualty is said to be caused by the "Act of God" when it happens by the direct, immediate, and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man and without human intervention. It must be of such character that it could not have been prevented or escaped from by any amount of foresight or prudence, or by the aid of any appliances which the situation of the party might reasonably require him to use.
>
> In *Butts* as here, the features of the appellants' construction work were an intervening cause to the heavy and unusual rainfall.

> This factor was found by the trial court to be the proximate cause of the flooding of the plaintiffs' property and the damage caused thereby.
>
> The evidence does not preponderate against the findings of the trial court and there is no reversible error of law. We, therefore, affirm the judgment of the trial court.

Zollinger, 837 S.W.2d at 614, 615.

In the present case, the Trial Court relied on *Zollinger* when concluding that "the denudement of Ms. Broyles' fields was an intervening cause. The 'Act of God' defense is therefore not applicable." The Trial Court went on to state that the "problem was caused by the turning and leveling of the soil." The evidence does not preponderate against these findings, and we affirm the Trial Court's rejection of Plaintiff's "Act of God" defense.

Plaintiff also claims that even if she can be held liable for creating a nuisance, Defendants are limited to the decrease in rental value and she cannot be required to pay for the cleaning and restoration of the ponds. We find ourselves somewhat puzzled by Plaintiff's position given that she has received the exact same type of damages, the cost of her well, that she now claims are inappropriate and should not be awarded to Defendants. We find no reason in the law or the facts of this case why Plaintiff can recover both the lost rental value and the cost to restore her property but Defendants should be limited solely to the lost rental value and not allowed to recover the cost of restoring their property. In any event, we again turn to *Pryor* where we stated:

> A party that has been subjected to a nuisance may be entitled to several types of damages. These damages may include the cost of restoring the plaintiff's property to its condition prior to the creation of the nuisance, personal damages such as inconvenience and emotional distress, and injury to the use and enjoyment of her property. Such damages are not mutually exclusive. *See Citizens Real Estate v. Mountain States Development Corporation*, 633 S.W.2d, 763, 767 (Tenn. Ct. App. 1981).

Pryor, 36 S.W.3d at 831. We hold that the Trial Court did not err when it allowed recovery by Defendants for the cost of repairing the damage to their ponds caused by Plaintiff.[3]

Finally, we note that Plaintiff offered no proof to counter Standifer's testimony as to the cost of restoring the two ponds. Although the Trial Court did not award Defendants the full

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[3] To the extent that *Mid-America Apartment Communities, L.P. v. Country Walk Partners*. No. W2002-00032-COA-R3-CV, 2002 WL 31895717 (Tenn. Ct. App. Dec. 31, 2002) can be read as limiting available remedies only to the decrease in rental value, we respectfully disagree with the conclusion reached in that case and instead agree with *Pryor*.

$8,400 that was requested, we reject Plaintiff's claim that the proof was insufficient to substantiate an award of $7,615.

The Trial Court awarded Plaintiff a judgment of $8,400, which included only $2,000 for the cost of the well. Plaintiff's judgment was then off-set by the judgment of $7,615 awarded to Defendants, thereby bringing Plaintiff's total judgment to $785. Because we have modified the Trial Court's judgment by increasing the amount awarded for installation of the well from $2,000, to $6,205, the net judgment to Plaintiff is increased to $4,990. In all other respects, the judgment of the Trial Court is affirmed.

Conclusion

The judgment of the Trial Court is modified by increasing Plaintiff's net judgment to $4,990, and the judgment is affirmed as modified. This cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed one-half to the Appellant Jann Broyles, and her surety, and one-half to the Appellees Thomas and Anneliese Standifer.

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D. MICHAEL SWINEY, JUDGE